house to execute a search warrant for drugs. They were familiar with respondent, having executed a search warrant at a different house occupied by him four years earlier. On that occasion, respondent ignored their repeated demands that he open his door, forcing the officers to use a battering ram to enter. When they broke through the front door, the officers saw respondent standing at one end of a short hallway and a loaded handgun sitting on top of a clothes basket at the other end. They found additional loaded firearms in respondent's bedroom. Four years later, the officers received a tip that respondent had drugs and an automatic weapon in his garage. Investigating the tip, the officers learned that the garage was attached to respondent's house, and they found marijuana seeds and soiled cloths of the sort used to clean firearms in his trash. Fearing for their safety, the officers took the precaution of applying for a "no-knock" search warrant, that is, one that not only permitted them to search respondent's house for drugs, but also permitted them to enter unannounced. A local Kansas judge agreed with their assessment of danger, adding a no-knock clause to the warrant, but the courts below disagreed and held that the evidence seized pursuant to the warrant must be suppressed.

The district court rejected the government's arguments that the good-faith exception applied, and more broadly held that the independent-source and inevitable-discovery doctrines did not apply in the context of a knock-and-announce violation. App., *infra*, 26a-28a. Although the government did not renew the independent- source and inevitable-discovery issues on appeal, it did challenge the district court's good-faith ruling. The court of appeals affirmed the district court's good-

faith holding, *id.* at 13a-16a, thus upholding the suppression of evidence, and denied the government's rehearing petition, which specifically asked the court to hold the case for *Hudson*, in which certiorari was granted only after the government had filed its appellate briefs. Reh'g Pet. 14-15.

In *Hudson*, this Court is considering whether knock-and-announce violations should result in the exclusion of all evidence seized pursuant to a lawful search warrant. Its decision will undoubtedly bear on the question whether the weapons and explosives seized from respondent's bedroom were properly suppressed in this case. Accordingly, the petition for a writ of certiorari should be held pending a decision in *Hudson*, and disposed of as appropriate in light of the Court's disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Hudson* v. *Michigan*, No. 04-1360, and then disposed of accordingly.

Respectfully submitted.

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MARCH 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-3424

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LAWRENCE D. NIELSON, DEFENDANT-APPELLEE

July 21, 2005

Before SEYMOUR, HOLLOWAY, and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

We must decide whether law enforcement officers violated Lawrence D. Nielson's Fourth Amendment rights when they executed a search warrant that authorized them to enter his home without complying with the Fourth Amendment's knock and announce requirement. Finding under the totality of the circumstances that officers were obligated to knock and announce prior to entering, the district court suppressed evidence seized during the search. Because we take the district court's view that law enforcement officers failed to demonstrate that they had an objectively reasonable suspicion that knocking and announcing would be dangerous or futile, we **AFFIRM**.

I

Law enforcement officials received an anonymous Crime Stoppers report that a person named Danny Mills or Danny Nielson possessed an automatic weapon kept in the loft in his garage and possessed narcotics in a work bench in the garage. Detective Eric Coffman, who is with the Junction City/Geary County Drug Task Force, determined that Nielson resided at an address matching that given by the tip. Coffman determined that Nielson had previously been arrested in 1999 for possession of a firearm by a convicted felon and had pled no contest to misdemeanor possession of marijuana. Relying on the tip and the circumstances of the 1999 search, he sought a search warrant authorizing police officers to search the residence without complying with the Fourth Amendment's "knock and announce" requirement. Finding that probable cause existed to support the search warrant with a "no-knock" exemption, a Geary County district judge signed the warrant granting authority to the police to search the home of Nielson and Caroline Vigil.

In executing the warrant the following morning at 4:45 a.m., police found Nielson, unclad, and Vigil, clad in a bathrobe, in a bedroom. A loaded .45 caliber handgun was found on the floor next to their bed, knives were on the night stand, and seven other firearms were recovered from a closet safe, including assault rifles. In the garage they found 25-millimeter military rounds, and an M21 artillery simulator. Detectives also seized small amounts of marijuana and smoking devices found in the garage workbench and bedroom. Both Nielson and Vigil were arrested.

In support of the application for a no-knock warrant, Detective Coffman provided an affidavit reciting three facts to establish probable cause for the search and to support reasonable suspicion for an exemption to the knock and announce requirement. First, police conducted a search of Nielson's home pursuant to a search warrant four years earlier. When executing the 1999 search, a loaded gun was found on top of a laundry basket outside a master bedroom, although both Nielson and Vigil were located between the kitchen and living room. That search uncovered five weapons and marijuana which resulted in Nielson being charged with possession of a firearm by a convicted felon and with misdemeanor possession of marijuana. Second, police received a Crime Stoppers anonymous report in August 2003 that Nielson possessed an automatic weapon and narcotics which were located in the garage. Third, detectives searched Nielson's garbage which revealed marijuana seeds, and "five round cloth patches" which they believed to have been used to clean firearms. In his affidavit, Coffman therefore requested "a no-knock search warrant for officer's safety based on Mr. Nielson's past history of possessing firearms and the potential for violence."

Before the district court, Nielson sought to suppress the evidence seized pursuant to the search, arguing that executing the search at 4:45 a.m. without knocking and announcing violated his constitutional rights. At the suppression hearing, Detective Coffman testified that officers were concerned that Nielson and Vigil might attempt to arm themselves if police knocked and announced. Officers determined that the garage where the Crime Stoppers tip said an automatic weapon and marijuana were located was connected to the house, but

they did not know if there was an interior passageway between the garage and the house. Regarding the search more than four years prior, detectives testified that placing a gun on a laundry basket was unusual, and speculated that Nielson had handled the gun shortly before police entered, though Nielson did not resist and did not threaten violence. Moreover, police noted that small amounts of marijuana for personal use are easily destroyed by flushing. Police thus feared both violence and destruction of evidence.

After hearing this testimony, the district court concluded that it was clear that the officers were obligated to knock and announce before entering Nielson's home. The district court found that the facts presented to support reasonable suspicion fell far short of providing reasons to believe Nielson would be violent or attempt to destroy evidence when he had exhibited no prior violent behavior and when he had not attempted to destroy evidence during the 1999 search. Finding that Tenth Circuit precedent clearly established that Detective Coffman's information was insufficient to support a no-knock execution to the search warrant, the district court refused to apply the good faith doctrine under *United States* v. *Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L.Ed.2d 677 (1984), and granted Nielson's motion to suppress the evidence obtained during the search. The United States now appeals.

II

On appeal from a motion to suppress, we accept the district court's factual findings unless they are clearly erroneous. *United States* v. *Moore*, 91 F.3d 96, 97 (10th Cir. 1996). When reviewing factual findings in the totality of the circumstances, we view the evidence in the

light most favorable to the prevailing party. *Id.* Because they are questions of law, we review de novo the reasonableness of a search and seizure under the Fourth Amendment, as well as the district court's determinations with regard to exigent circumstances. *United States* v. *Dahlman*, 13 F.3d 1391, 1398 (10th Cir. 1993).

We must begin any examination of Fourth Amendment limitations on no-knock entries with two Supreme Court cases. The first, *Wilson* v. *Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L.Ed.2d 976 (1995), held that the common-law knock and announce principle forms part of the Fourth Amendment reasonableness inquiry. Tracing deep into the English Common law the history of the principle that a person's house is "his castle of defence and asylum," 3 W. Blackstone, *Commentaries* 288, the Supreme Court concluded that the prohibition against the sovereign's breaking down doors without first knocking and announcing was "woven quickly into the fabric of early American law." *Id.* at 932-933, 115 S. Ct. 1914; *see also*, *Miller* v. *United States*, 357 U.S. 301, 313, 78 S. Ct. 1190, 2 L.Ed.2d 1332 (1958) ("The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application."). Not only is it part of our common law heritage, but because the reasonableness of a search under the Fourth Amendment may depend in part on the manner in which the search is executed, the Court reasoned: "[W]e have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Wilson*, 514 U.S. at 934, 115 S. Ct. 1914. The

Court was quick to note, however, that inquiry into the reasonableness of an unannounced entry must be flexible. *Id.* at 934, 115 S. Ct. 1914 ("The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.").

In the second case, *Richards* v. *Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 137 L.Ed.2d 615 (1997), the Court struck down the Wisconsin Supreme Court's conclusion that the knock and announce requirement did not apply to felony drug cases because as a category they all involved a high risk of harm to police officers and a threat of disposal of drugs. Under the flexible approach announced in *Wilson*, the Court explained that "the knock-and-announce requirement could give way under circumstances presenting a threat of physical violence or where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." *Id.* at 391, 117 S. Ct. 1416 (quotation omitted). Before law enforcement officers may enter a dwelling without complying with the knock and announce requirement, they "must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394, 117 S. Ct. 1416. However, an officer must have an objectively reasonable belief, and may not rely on subjective factors or hunches. *See United States* v. *Maden*, 64 F.3d 1505, 1509 (10th Cir. 1995); *United States* v. *Stewart*, 867 F.2d 581, 584 (10th Cir. 1989) (examining "whether the officers, after considering the *particular* facts regarding

the premises to be searched and the circumstances surrounding the execution of the warrant, could reasonably have decided that an urgent need existed for [a no-knock] entry into the premises").

When reviewing a district court's suppression ruling, we must "determine whether the facts and circumstances of the particular entry justified dispensing with the knock and announce requirement." *Richards*, 520 U.S. at 394, 117 S. Ct. 1416. Because "[a] trial judge views the facts of a particular case in light of the distinctive features and events of the community," *Ornelas* v. *United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L.Ed.2d 911 (1996), we owe due deference to the district court's evaluation of the factual context in determining whether reasonable suspicion existed to justify a no-knock entry. Despite our deferential standard of review, the government urges that the totality of the circumstances demonstrates that the district court clearly erred in making its findings. The district court found:

> [T]here was a prior history of searching defendant's residence without violence or the destruction of evidence. When defendant's residence was searched in 1999, the officers knocked and announced before entering the house. Defendant and Caroline Vigil were awake when the search was conducted. Although they did not answer the door, there is no claim that they attempted to destroy evidence or that they threatened the safety of the officers. In addition, there is no evidence or indication that defendant or his girlfriend had acted violently or threatened violence toward officers or others since 1999. The only evidence referred to in the affidavit to support a no-knock entry for the safety of the of-

> ficers is the anonymous tip that defendant had automatic weapons in the loft of his garage approximately seven weeks before the search was conducted.

Slip op. at 8. Based on these findings, the district court concluded that this case was not close because no facts were alleged in the affidavit or existed in the totality of the circumstances to justify a no-knock entry. We cannot conclude that these factual findings are clearly erroneous.

Whether these facts are sufficient to support a determination with regard to dangerous or exigent circumstances is a legal question we review de novo. *Dahlman*, 13 F.3d at 1398. Search and seizure cases involve, by their very nature, fact-dependent and case-specific inquiries. Thus, our inquiry into whether exigent circumstances exist must rely on analogical reasoning from prior holdings and prior circumstances, as well as a close look at the particular circumstances law enforcement officers confronted in this case. Following the Supreme Court, our prior holdings have focused on the criminal history and past violent behavior of the defendant as well as the conduct under investigation with particular emphasis on trafficking in narcotics with possession of a firearm. *See United States* v. *Ramirez*, 523 U.S. 65, 68-69, 118 S. Ct. 992, 140 L.Ed.2d 191 (1998) (upholding a no-knock search when the defendant had escaped from police custody, having violently attempted to do so on previous occasions, and was believed to be hiding at a home suspected of having a "stash of guns"); *United States* v. *Gay*, 240 F.3d 1222 (10th Cir. 2001) (relying on information that defendant had jumped bail, had been involved in a prior police shootout, and was armed at all times); *United States* v.

King, 222 F.3d 1280 (10th Cir. 2000) (relying on information that defendant sold drugs, that he belonged to a gang, that he had previously displayed a willingness to use his gun, and that another drug dealer might be present in the house with a gun); *United States* v. *Myers*, 106 F.3d 936, 940 (10th Cir. 1997) (relying on knowledge that defendant had been convicted of possession of a firearm and a firebomb, had been involved in the firebombing of a police vehicle, had prior convictions for burglary, theft and drug trafficking, and was suspected of current drug trafficking activity); *Dahlman*, 13 F.3d at 1398 (relying on information that defendant "intended to shoot it out with police rather than be arrested."); *cf. United States* v. *Geraldo*, 271 F.3d 1112, 1118 (D.C. Cir. 2001) (noting agreement among circuits "that the presence of a firearm coupled with information such as a suspect's violent tendencies, criminal record, or specific violent threats is enough to create an exigency because the weapon might be used").

For example, in *United States* v. *Colonna*, 360 F.3d 1169, 1176 (10th Cir. 2004), we upheld a no-knock execution of a search warrant in an investigation of narcotics-trafficking when defendant had been arrested 24 times with charges including assault on a police officer, had been convicted of two felonies, and the affidavit supporting the warrant stated defendant had been aggressive with police officers in the past. More recently, our circuit overturned a district court's suppression of evidence seized pursuant to a no-knock warrant when the defendant possessed firearms, was known to be dealing methamphetamine, and had been arrested four prior times for domestic battery and battery on a law-enforcement officer which we concluded "indicated a volatile, violent disposition." *United States* v. *Musa*, 401

F.3d 1208, 1214 (10th Cir. 2005). We found further support justifying the no-knock entry in the fact that children had been observed playing in the area. *Id.* at 1214.

None of the elements that have supported dispensing with the knock and announce requirement in our case law exist in the current factual circumstances. Our inquiry remains flexible, but because the Supreme Court "left to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment," *Ramirez*, 523 U.S. at 70, 118 S. Ct. 992 (quotation omitted), we ordinarily expect the government to justify a no-knock entry in light of our case law. Although the standard for reasonable suspicion is not high, *Richards*, 520 U.S. at 395, 117 S. Ct. 1416, requiring no more than a "particularized and objective basis," *Ornelas*, 517 U.S. at 696, 116 S. Ct. 1657, for believing exigent circumstances exist, the police in this case fail to provide such a basis to believe that knocking and announcing their presence would have been dangerous or futile. *See Moore*, 91 F.3d at 98.

We find particularly notable in the present case the fact that law enforcement officers make no claim that Nielson was distributing narcotics or that he had engaged in any prior violent conduct. Detective Coffman explicitly testified to the fact that he had no information when executing the search warrant that either Vigil or Nielson had engaged in past acts of violence. Moreover, the prior search of Nielson's home resulted in no violence, and despite his silent refusal to answer the door, he apparently cooperated after the police entered. Although the police had evidence that a firearm was present, that fact by itself does not demonstrate an increased risk beyond that normally faced by law en-

forcement officers, especially where, as here, their information was that a firearm was in a loft in the garage, and they had no information leading them to believe that Nielson had interior access to the garage. Further reasons to believe that knocking and announcing police presence would be dangerous or futile, such as counter-surveillance activities, are also absent in this case. *See United States* v. *Cline*, 349 F.3d 1276, 1289-90 (10th Cir. 2003). Without a prior history of violence in interacting with police, without a record of prior convictions that indicate a predilection towards violence, without a suspicion that defendant was engaged in narcotics trafficking, or without any other exigent circumstances such as children playing nearby or evidence of counter-surveillance activities, we cannot conclude that the police had sufficient justification in this case for a no-knock warrant.

Law enforcement officers may have perceived certain additional risks caused by the likelihood that Nielson possessed guns, at least in the garage, to which he may have had access. However, perception of an increased risk does not by itself establish the objective, reasonable suspicion that exigent circumstances exist. In response to the court's own questions, Detective Coffman testified that the belief that firearms are present is sufficient to justify a no-knock search.[1] Our precedent has made clear that the "mere statement that firearms are present, standing alone, is insuffi-

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[1] We find this statement troubling in light of our prior observations that "[o]ur concern is heightened because this court 'seems to be reviewing the actions of Kansas police executing 'knock and announce' warrants with some frequency.' " *United States* v. *Jenkins*, 175 F.3d 1208, 1215 (10th Cir. 1999) (quoting *United States* v. *McCloud*, 127 F.3d 1284, 1288 n. 3 (10th Cir. 1997)).

cient," *Moore*, 91 F.3d at 96; *Jenkins*, 175 F.3d at 1214 ("[T]he mere likelihood that drugs or weapons will be found in the searched premises alone will [not] support the reasonableness of a given waiting period."). To hold otherwise would risk running afoul of the Supreme Court's admonishment against "creating exceptions to the knock-and-announce rule based on the 'culture' surrounding a general category of criminal behavior." *Richards*, 520 U.S. at 392, 117 S. Ct. 1416. Such a blanket approach was clearly rejected by the Court in *Richards* in favor of a case-by-case analysis, and we have similarly concluded that to justify no-knock entries based on claims that officers executing narcotics search warrants always have increased risks would "expand the exigent circumstances exception to such an extent [that it] would completely swallow the rule." *Moore*, 91 F.3d at 98.

Although the potential presence of loaded weapons may heighten the risk to law enforcement officers, where no other evidence of potential violence or danger exists, we have made clear that such circumstances do not support reasonable suspicion that exigent circumstances justify dispensing with the requirement that police knock and announce their presence when executing a search warrant.[2] The district court properly concluded that the police failed to demonstrate reasonable suspicion that in this particular circumstance knocking and announcing their presence would be dan-

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[2] "[I]f the knock and announce requirement is to remain the rule rather than the exception, we must still be able to tell the difference between the ordinary risks to officer safety in serving search warrants and the risks to officer safety in instances in which a no-knock entry is justified." *Musa*, 401 F.3d at 1219 (Henry, J. dissenting).

gerous or futile or would lead to the destruction of evidence.

III

Nielson's Fourth Amendment rights were violated when the police failed to comply with their constitutional duty to knock and announce their presence. Nonetheless, the government argues that the officers' actions were conducted in good faith. Because the remedy courts have fashioned for Fourth Amendment violations is harsh, requiring the exclusion of potentially reliable evidence of wrongdoing, we conduct a separate inquiry as to whether the exclusionary sanction is appropriate. Designed to provide a deterrent to police misconduct, the exclusionary rule is not mandated by the Fourth Amendment. *See Leon*, 468 U.S. at 906-907, 104 S. Ct. 3405. Thus, the Court has created a good-faith exception to imposition of the exclusionary rule when law enforcement officers' reliance on a magistrate's warrant is objectively reasonable. *Id.* at 922-24, 104 S. Ct. 3405.

Although the analysis in *Leon* specifically addressed whether the exclusionary sanction should be applied to warrants lacking probable cause to justify a search, the government argues that good faith excuses its failure to comply with the Fourth Amendment knock and announce requirement. *See, e.g., United States* v. *Tisdale*, 195 F.3d 70, 73 (2d Cir. 1999) (holding on *Leon* good-faith grounds that defendant was not entitled to suppression of evidence seized pursuant to a no-knock entry). Finding that the warrant application was so lacking in a particularized and objectively reasonable suspicion that knocking and announcing would be dangerous or futile, the district court denied the government's request to apply the good-faith exception to its Fourth

Amendment violation. We review the district court's decision whether to apply the *Leon* good-faith exception de novo. *United States* v. *Riccardi*, 405 F.3d 852, 860 (10th Cir. 2005).

In determining whether to suppress evidence "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 923, n. 23, 104 S. Ct. 3405. In *Leon* the Court enumerated four general situations in which law enforcement officers who relied on an invalid warrant could not benefit from the good faith exception, one of which is relevant to the present case. The Court provided that "a warrant may be so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Id.* at 923, 104 S. Ct. 3405. Specifically regarding no-knock warrants, the Supreme Court has provided that "[w]hen a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a 'no-knock' entry." *United States* v. *Banks*, 540 U.S. 31, 36, 124 S. Ct. 521, 157 L.Ed.2d 343 (2003). Thus, if the warrant in the present case is so facially deficient with regard to whether reasonable suspicion that knocking and announcing police presence would be dangerous or futile, then the good-faith exception may not be applied.

In response to questions from the court below, Detective Coffman represented that the mere belief that firearms are present is sufficient to justify a warrant from a state judge excusing compliance with the Fourth

Amendment's knock and announce requirement.[3] Although "[t]he practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time," *Richards*, 520 U.S. at 396 n. 7, 117 S. Ct. 1416, Detective Coffman's affidavit fails to allege that sufficient cause exists in this case to support a no-knock execution of the search warrant. Our holdings have established that evidence of the presence of firearms, without more, is insufficient to justify a no-knock entry, and so, necessarily the mere belief that firearms are present would be insufficient as well. *See Moore*, 91 F.3d at 98 ("[T]he mere fact that firearms were present was insufficient to demonstrate exigent circumstances."); *Jenkins*, 175 F.3d at 1214.

Officers must demonstrate that they have an objectively reasonable concern that exigent circumstances exist. *See Stewart*, 867 F.2d at 584-85 (suppressing evidence because no-knock entry not supported by objectively reasonable belief that exigent circumstances existed); *see also, United States* v. *Bates*, 84 F.3d 790 (6th Cir. 1996) (affirming the district court's suppression of evidence seized in violation of the knock and announce requirement because belief that defendant was likely to be violent was not objectively reasonable). The warrant in this case is lacking in a sufficient indicia of reasonable suspicion that exigent circumstances exist as to Nielson's "potential for violence" or as to the threat posed by his "past history of possessing firearms."[4] As

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[3] It does not appear that Kansas provides statutory approval for no-knock warrants. *See Estate of Fuentes* v. *Thomas*, 107 F. Supp.2d 1288, 1298 (D. Kan. 2000).

[4] We find instructive the Eighth Circuit's reasoning that the "good-faith exception is perfectly suited for cases . . . when the

we have already discussed, the affidavit in support of the no-knock search warrant presented facts that established past possession of firearms and small amounts of marijuana, and present evidence of the same. Officers failed to present any evidence of past violent behavior that would indicate a potential for present violence or futility, or any other evidence that would provide a reason to believe Nielson or Vigil would be violent. In light of our clear precedent providing that mere allegations of the presence of a firearm are insufficient to support a no-knock entry, we cannot say that law enforcement officers' reliance on the state judge's authorization was objectively reasonable. Therefore we conclude that law enforcement officers are not entitled to a good-faith exception to suppression of evidence in this case.

IV

Because we agree with the district court that the circumstances presented in this case did not excuse law enforcement officers from complying with the Fourth Amendment's knock and announce requirement, we **AFFIRM**.

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judge's decision was borderline." *United States* v. *Scroggins*, 361 F.3d 1075, 1084 (8th Cir. 2004). In that case, a "borderline" decision to authorize a no-knock entry was made pursuant to an affidavit that alleged that "the defendant was part of a large-scale drug-trafficking organization, that he had prior arrests for narcotics and weapons, that known drug dealers repeatedly visited the premises, and that officers had found a round from an assault rifle in his trash." *Id.* By comparison to these "borderline" averments, the district court in the present case could quite reasonably state, as it did, "we do not believe this is a close call."

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT KANSAS

No. 04-40068-01-RDR

UNITED STATES OF AMERICA, PLAINTIFF

v.

LAWRENCE D. NIELSON, DEFENDANT

Oct. 6, 2004

MEMORANDUM AND ORDER

RICHARD D. ROGERS, District Judge.

Defendant is indicted on charges of possessing and receiving firearms, ammunition and explosive materials. The charges arise from a search of a residence that defendant maintained with Caroline Vigil. This case is now before the court upon defendant's motion to suppress.

Defendant's motion to suppress alleges that evidence from the search should be suppressed because the officers executed the search at 4:45 a.m. and failed to knock and announce prior to entering his residence. Defendant contends that this violated the Fourth Amendment's ban on unreasonable searches and seizures.

Facts

The search of defendant's residence was conducted pursuant to a search warrant issued by a state court judge. The affidavit for the search warrant was made by Eric Coffman, a detective with the Junction City-Geary County Drug Task Force. Detective Coffman is a well-experienced police officer with hundreds of hours of drug enforcement training. He and a SWAT team of other state or local law enforcement officers executed the search warrant.

The affidavit for the search warrant begins by describing a 1999 search of another residence defendant maintained with Caroline Vigil. That search was also conducted pursuant to a warrant. According to the affidavit, the search discovered 40 grams of marijuana, three rifles in a gun safe in the bedroom, a handgun between the bed frame and the mattress, and another handgun in a clothes basket in the hallway just outside the master bedroom. According to the affidavit, defendant and Vigil were located between the living room and the kitchen at the time the officers entered the residence.

During the hearing upon the instant motion to suppress, defendant introduced an exhibit containing reports made after the 1999 search. The reports indicate that the officers forcibly entered the home at about 11:30 p.m. after knocking and waiting for a response three separate times. The lights were on in the house. No resistance from defendant or Vigil was reported by the officers.

The search warrant affidavit goes on to detail that on August 12, 2003 an anonymous crime stoppers report was received indicating that there were automatic

weapons and "narcotics" in defendant's garage. Almost two months later, on October 7, 2003, a search of defendant's trash found a "small amount" of marijuana and marijuana seeds, as well as cloth patches that might be used to clean firearms.

On the same day, October 7 at 3:10 p.m., pursuant to the affidavit, a search warrant was issued to look for and seize marijuana, drug-related paraphernalia and documents. The affidavit did not request permission to search for firearms, and the warrant does not mention firearms as an item to seize. Detective Coffman testified that he did not believe the officers had probable cause to search for firearms at the residence, but that there was a reasonable suspicion that firearms were kept there.

The affidavit requested a no-knock search warrant "for officer's safety based on Mr. Nielson's past history of possessing firearms and the potential for violence." The affidavit does not describe any past violent acts by defendant or Vigil. The affidavit also does not describe a suspicion that defendant or Vigil were involved in drug trafficking. A no-knock search warrant was issued.

The warrant was executed by a SWAT team the next day, October 8, 2003 at 4:45 a.m. The officers did not knock and announce before forcibly entering the residence. They used a 35-pound battering ram to force open the door. Detective Coffman entered the residence approximately one minute after the first officers made their entry. Coffman testified that when he entered, defendant had no clothes on and Vigil was wearing a bathrobe.

Detective Coffman further testified that he asked for a no-knock warrant because he was concerned that the marijuana he expected to find could be easily destroyed if the officers knocked and announced their presence before entering, and because he was concerned about the danger of the firearms he expected to find. He stated that a fellow officer who participated in the 1999 search told him he suspected that prior to the officers' entry of defendant's house in 1999, someone in the house may have been holding the gun that was found in the clothes basket.

The crime stoppers tip referred to in the affidavit mentioned that narcotics and an automatic weapon could be found in the garage of defendant's residence. The residence did not contain an interior door to the garage, although this fact was not known to the officers prior to executing the warrant.

Standards

In *U.S.* v. *Colonna*, 360 F.3d 1169, 1176 (10th Cir. 2004), the Tenth Circuit summarized the standards to apply in this matter.

In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of a crime by, for example, allowing the destruction of evidence. *Richards* v. *Wisconsin*, 520 U.S. 385, 394 (1997). Similar considerations justify the nighttime execution of a search warrant. *See United States* v. *Tucker*, 313 F.3d 1259, 1265-66 (10th Cir. 2002) (nighttime execution reasonable given risk of destruction of evidence, personal injuries to nearby residents, and property damage due to

volatile nature of chemicals used to manufacture methamphetamine). In reviewing a challenge to the no-knock or nighttime execution of a search warrant, we review the execution from the perspective of reasonable officers who are legitimately concerned not only with doing their job, but with their own safety. *United States* v. *Myers*, 106 F.3d 936, 940 (10th Cir. 1997).

"Reasonable suspicion" in the context of a Terry stop has been defined to require "a particularized and objective basis" for suspecting a person of criminal activity. *U.S.* v. *Arvizu*, 534 U.S. 266, 273 (2002). It requires more than a mere "hunch," but it need not rise to the level required for probable cause, and "it falls considerably short of satisfying a preponderance of the evidence standard." *Id.* at 274.

The interests protected by the Fourth Amendment in cases like the one at bar should not be unduly minimized according to the Supreme Court.

While it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. As we observed in *Wilson* v. *Arkansas*, 514 U.S. 927, 930-32 (1995), the common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.

Additionally, when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry. . . . The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

Richards v. *Wisconsin*, 520 U.S. 385, 393 n. 5. See also, *Miller* v. *United States*, 357 U.S. 301, 313 (1958) ("The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application."); *Jones* v. *United States*, 357 U.S. 493, 498 (1958) ("[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home."); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477 (1971) (midnight entry into a home was an "extremely serious intrusion"); *U.S.* v. *Callwood*, 66 F.3d 1110, 1112-13 (10th Cir. 1995) ("a nighttime search is particularly intrusive"); *U.S.* v. *Gibbons*, 607 F.2d 1320, 1326 (10th Cir. 1979) (recognizing the common law's "strong aversion" to nighttime searches, particularly such searches of a home).

As determined in Richards, the fact that this was a drug investigation does not by itself justify a no-knock approach, although such investigations "may frequently present circumstances warranting a no-knock entry." 520 U.S. at 394. "Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce require-ment." *Id.*; see also, *U.S.* v. *Colonna*, 360 F.3d 1169, 1176 (10th Cir. 2004) (mere likelihood that drugs or weapons will be found in the searched premises alone does not justify a no-knock or nighttime execution of a search warrant); *U.S.* v. *Jenkins*, 175 F.3d 1208, 1214 (10th Cir. 1999) (mere likelihood that drugs or weapons will be found will not alone support the reasonableness of a certain waiting period after announcing and prior to entering). Additionally, in cases in which there was some indication that a firearm was present in the resi-

dence to be searched, this information alone has been held insufficient to justify the failure to knock and announce. See *U.S.* v. *Moore*, 91 F.3d 96, 98 (10th Cir. 1996); *U.S.* v. *Bates*, 84 F.3d 790, 795 (6th Cir. 1996); *U.S.* v. *Marts*, 986 F.2d 1216, 1218 (8th Cir. 1993)); see also, *U.S.* v. *Granville*, 222 F.3d 1214, 1219 (9th Cir. 2000) (generalized fears that drug dealers keep weapons is not enough to establish exigency required for a no-knock search).

The Tenth Circuit has also stated in past cases that the exceptions to the knock and announce requirement should not swallow the rule. See Moore, 91 F.3d at 98; *U.S.* v. *Stewart*, 867 F.2d 581, 586 (10th Cir. 1989).

Analysis

Reviews of no-knock entries to execute search warrants are obviously fact-sensitive inquiries. There are many cases in which a defendant's prior history of violence has been a significant factor in justifying a no-knock entry. In this case, there was a prior history of searching defendant's residence without violence or the destruction of evidence. When defendant's residence was searched in 1999, the officers knocked and announced before entering the house. Defendant and Caroline Vigil were awake when the search was conducted. Although they did not answer the door, there is no claim that they attempted to destroy evidence or that they threatened the safety of the officers. In addition, there is no evidence or indication that defendant or his girlfriend had acted violently or threatened violence toward officers or others since 1999. The only evidence referred to in the affidavit to support a no-knock entry for the safety of the officers is the anonymous tip that defendant had automatic weapons in the

loft of his garage approximately seven weeks before the search was conducted. Under well-established Tenth Circuit precedent, this is insufficient to justify a no-knock entry.

During the hearing upon the instant motion, there was also reference to an impression that defendant handled a gun just prior to the officers' entry in 1999. This was based upon the idea that a clothes basket is an unusual place to keep a gun. But, it is speculation or a mere hunch that defendant or Vigil handled the gun after learning that the police were entering or seeking to enter their home in 1999. Neither defendant nor Vigil was near the basket when the officers made their entry according to the written reports of the 1999 search.

The threat of destruction of evidence has also been cited as grounds for the no-knock entry. However, this was not a problem during the 1999 entry. In addition, the only objective and particularized information available to the officers was that the narcotics were in the garage in a workbench, some distance from where defendant and Vigil would likely be at 4:45 a.m. There was no allegation of drug trafficking which might provide an additional incentive for or experience in disposing of drug evidence. Nor was there an allegation of any defensive measures against surveillance or measures to detect law enforcement. Once again, the court finds no particularized information to support a no-knock entry on the grounds that evidence would be destroyed if advance notice was given. To permit a no-knock entry under these circumstances would largely do away with a knock and announce requirement in drug cases.

We find the cases cited by the government as analogous to the facts here to be distinguishable. For in-

stance, *U.S.* v. *Berrocal*, 2000 WL 1629437 (10th Cir. 10/31/2000) is an unpublished case involving the evening search of the home of a suspected methamphetamine trafficker. While *Berrocal* may be close to the facts of this case, the time of the search was different, the suspicion of drug trafficking was different, and the knowledge of the officers regarding the location of the drugs was different. *U.S.* v. *Wilson*, 899 F. Supp. 521 (D. Kan. 1995) concerned the search of a crack house in which there were persons the officers reasonably suspected as being armed and dangerous. *U.S.* v. *Singer*, 943 F.2d 758 (7th Cir. 1991) involved the search of the home of an alleged drug trafficker who was suspected to have possessed firearms and to have made threats.

The court also believes that support for defendant's motion can be found in the result of *U.S.* v. *Banks*, 540 U.S. 31, 124 S. Ct. 521 (2003). In *Banks*, the police had information that the defendant was selling cocaine from his two-bedroom apartment. They arrived at the apartment with a search warrant at 2:00 p.m. They called out "police search warrant," rapped hard on the door, but heard no response. After waiting 15 or 20 seconds, they used a battering ram to open the front door. The defendant was in the shower and testified that he heard nothing until the crash of the door. The Court held that, although "this call is a close one," the police "could fairly suspect that the cocaine would be gone if they were reticent any longer," and therefore the police were justified in entering when and as they did. 124 S. Ct. at 526.

In the case at bar, however, there was no wait or reticence whatsoever, even though the search was conducted at 4:45 a.m., not 2:00 p.m. The police did not knock and wait 15 to 20 seconds. They forced the door

open without knocking or announcing first. In spite of the information regarding defendant's possession of an automatic weapon, we do not believe this is a close call. We believe it is clear that the officers had an obligation to knock and announce before executing the search warrant.

The government has asserted that even if adequate grounds for a no-knock entry did not exist in this case, the question is sufficiently close to avoid suppression of the evidence by applying the good faith doctrine under *United States* v. *Leon*, 468 U.S. 897 (1984). We disagree. It is the court's impression from the testimony that the no-knock warrant was issued in this case primarily upon the reasonable suspicion that defendant had firearms at the residence. There was also a reasonable suspicion that defendant had marijuana in his garage. But, there was nothing more "particularized" and "objective" to substantiate the kind of reasonable suspicion necessary to support a no-knock entry. Given the holding of the Supreme1 Court in Richards, and the Tenth Circuit's holdings in Moore and Jenkins, the court believes it was clearly established at the time of the application for the search warrant that the information supplied to the state court judge was insufficient to support a no-knock entry in this case. Cf., *U.S.* v. *Gonzalez*, 164 F. Supp.2d 119, 126-27 (D. Mass. 2001) (good faith doctrine applied to deny suppression of evidence from a 1995 search with similar facts, but court states that good faith exception would not be applied to searches on such facts conducted after the Richards decision).

Finally, the government has argued that the court should apply the inevitable discovery doctrine and hold that the suppression of evidence is an improper remedy

in this case even if the search was unreasonable because of the failure to knock and announce. The government cites case authority from the Seventh Circuit for this contention. *U.S.* v. *Sutton*, 336 F.3d 550 (7th Cir. 2003); *U.S.* v. *Langford*, 314 F.3d 892 (7th Cir. 2002) *cert. denied*, 124 S .Ct. 920 (2003); see also, *People* v. *Stevens*, 597 N.W.2d 53 (Mich. .1999) *cert. denied*, 528 U.S. 1164 (2000). The government also suggests that the independent source doctrine should be applied to the same effect.

The independent source doctrine and the inevitable discovery doctrine are exceptions to the rule that requires the exclusion of evidence obtained as a result of unlawful government conduct. *U.S.* v. *Larsen*, 127 F.3d 984, 986 (10th Cir. 1997) *cert. denied*, 522 U.S. 1140 (1998). Each doctrine requires that the government demonstrate that the evidence would have been found as a result of an investigation independent of the constitutional violation. *Id.* at 987; see also, *U.S.* v. *Souza*, 223 F.3d 1197, 1202-03 & 1206 (10th Cir. 2000); *U.S.* v. *Griffin*, 48 F.3d 1147, 1150 (10th Cir.) *cert. denied*, 515 U.S. 1168 (1995).

The court does not believe a search pursuant to a search warrant should be viewed as independent from the entry of a residence to execute the search warrant. Without describing their analysis in detail, the court shall follow the majority of courts that have rejected the application of the inevitable discovery or independent source doctrine in this situation. *U.S.* v. *Dice*, 200 F.3d 978, 984-85 (6th Cir. 2000); *U.S.* v. *Marts*, 986 F.2d 1216, 1219-20 (8th Cir. 1993); *U.S.* v. *Holmes*, 183 F. Supp.2d 108, 111 (D. Me. 2002); *Gonzalez*, 164 F.Supp.2d at 123 fn.2; *U.S.* v. *Shugart*, 889 F. Supp. 963, 977 (E.D.Tex.1995); *Mazepink* v. *State*, 987 S.W.2d 648, 657

(Ark.) *cert. denied*, 528 U.S. 927 (1999); *State* v. *Lee*, 821 A.2d 922, 937 (Md. 2003); *District of Columbia* v. *Mancouso*, 778 A.2d 270, 275 n. 10 (D.C.2001); *Kellom* v. *State*, 849 So.2d 391, 396 (Fla. App. 2003); *People* v. *Tate*, 753 N.E.2d 347, 352 (Ill. App. 2001); *State* v. *Martinez*, 579 N.W.2d 144, 148 (Minn. App. 1998); *State* v. *Taylor*, 733 N.E.2d 310, 312 (Ohio App. 1999); *Commonwealth* v. *Rudisill*, 622 A.2d 397, 400 n. 7 (Pa. Super. 1993); *Price* v. *State*, 93 S.W.3d 358, 370-71 (Tex. App. 2002).

Conclusion

The motion to suppress shall be granted.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-3424

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LAWRENCE D. NIELSON, DEFENDANT-APPELLEE

Oct. 12, 2005

ORDER

Before SEYMOUR, HOLLOWAY, and LUCERO, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
CLERK, COURT OF APPEALS
by: Signature Illegible
Deputy Clerk

Opposition Brief Unavailable for Filming at this Time